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Supreme Court, U.S.
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No. 04-1099

In The
Supreme Court of the United States

CAROL STAVROPOULOS,

Petitioner,

v.

EVAN FIRESTONE, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

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QUESTIONS PRESENTED

1.

Whether the current case law across the various circuits is consistent with this Court's previous decisions and provides the necessary flexibility to address claims of "adverse employment actions" under the facts of individual cases?

2.

Whether any action identified by Petitioner rises to the level of adverse employment action in analysis of a First Amendment retaliation claim under 42 U.S.C. § 1983 or under Title VII?

3.

Whether lowering the standard for what constitutes adverse employment action would effectively eviscerate the defense of qualified immunity, as virtually all government decisions and actions could be adverse actions under "clearly established" law?

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

Respondents adopt and incorporate by reference herein the following portions of the Petition for a Writ of Certiorari: Parties to the Proceedings Below, Opinions Below, Statement of Jurisdiction, and Relevant Statutory Provisions.

STATEMENT OF THE CASE

While the opinion of the court below adequately relates the facts involved in this matter, the Respondents believe that it would be beneficial to further elaborate on those facts to demonstrate that the Petitioner suffered no adverse employment action which could serve as a basis for her claims.

Petitioner's employment at UGA, 1993-94

Petitioner was employed by Respondent Board of Regents as an assistant professor in the University of Georgia's School of Art beginning the 1993-94 academic year. (Pet. App. 2a). The director of the School of Art at the time was Respondent Firestone. *Id.* Petitioner was assigned to teach in the art education area, whose chairperson at the time was Respondent Nix. Respondent Squires was a peer-level faculty member with Petitioner. (Resp. Firestone, *et al.*, C.A. Br. 3).

Tenure-track faculty members at UGA who have not attained tenure are employed pursuant to one-year annual contracts, and each year the senior faculty vote on

whether to offer a new contract for the next academic year. (Pet. App. 2a).

Petitioner experienced depression and anxiety for a number of years, beginning during her first year in Athens (1993-94), before the occurrence of any of the events about which she complained in this lawsuit. (Record 100: 23-28). Her problems with depression began when she "had a marital situation." (Record 100: 26). She has been treated over the years with Zoloft, Diazepam, Wellbutrin, Prozac, Ambien and Klonopin. (Record 100: 23-28). During the spring quarter of 1997, Petitioner took medical leave because of migraine headaches, and she then became addicted to narcotics. (Record 100: 75-81, 114-115; Record 119: 16-19).

The computer art search, 1994-95

As noted below, during the 1994-95 academic year, Dr. Firestone appointed Petitioner and five others to serve on a search committee charged with conducting a national search to hire a computer artist. (Pet. App. 2a). Petitioner ultimately disagreed with how she thought that search committee operated and the conclusion it reached. *Id.*

After the search committee voted to hire a candidate different from the one Petitioner desired, Petitioner "had a tantrum." (Resp. Firestone, *et al.*, C.A. Br. 4). According to committee member Ed Lambert, she was "extremely, extremely upset." [. . . She] "physically got up from the desk and was shaking her fists at us. . . . She was very violent. [She was] right in your face yelling." (Record 123: 23-24). According to committee member Lanny Webb, Petitioner became very upset and hysterical. He "remember[s] papers were in the air and her voice was raised. She

was very upset. . . ." Webb testified, "I was very disappointed that Dr. Stavropoulos had used her position . . . to retaliate against another colleague [Kaufman] who (sic) she had a disagreement with." She questioned the honesty and integrity of the committee members who voted for Kaufman. (Record 129: 17-19; Record 129 ex. 2; Pet. App. 2a).

Notwithstanding the Petitioner's position, as outlined in a minority opinion report prepared by a colleague, Petitioner did not say anything of substance to the full faculty, nor did she speak during a meeting with the Associate Dean of the College of Arts and Sciences, to discuss the computer art hiring process. (Resp. Firestone, *et al.*, C.A. Br. 4).

Subsequently, Respondent Firestone issued a memorandum dated March 27, 1995, to Petitioner and her colleague, stating in its entirety,

> In regard to your March 24, 1995 memo [the "minority report" to Dean Anderson, Record 111 ex. 16], please recognize that search committee recommendations are advisory to the faculty. The faculty can accept or reject the recommendation(s) of the committee. In the case of the computer art position, the faculty subscribed to the search committee's majority recommendation (four of six members).
>
> Insofar as the search and vote for appointment followed The University of Georgia's Guidelines for Appointment, Promotion, and Tenure and Dean Anderson's "Guidelines for Recruitment of Tenure-Track Faculty," I am surprised that you intend to press a minority position that is advisory to begin with.

> You should realize that your intended involvement in the appointment process at this point is unprecedented in the School of Art. However, it is your prerogative to meet with the Dean or one of his staff (Associate Dean John Morrow oversaw this search), to which I have no objection.

(Pet. App. 3a; Record 111 ex. 17). The memorandum was copied to the Dean and the Associate Dean of the School of Art. *Id.* After investigating the matter, the Dean's office ultimately deferred to the School of Art and approved the hiring of Kaufman. (Resp. Board of Regents C.A. Br. 6).

After the computer art search, according to Petitioner, she "noticed [her] art education colleagues were treating [her] differently. Nothing [she] could put [her] finger on, just a little more distance." (Record 100: 51-52).

1995 uneffectuated nonrenewal vote for 1996-97

In the spring of 1995, the senior faculty of the School of Art voted not to renew Petitioner's employment contract for the 1996-97 academic year because of the faculty's perception that Petitioner refused to behave professionally or to have collegial relationships with her colleagues. (Pet. App. 3a, Resp. Board of Regents C.A. Br. 6-7). Petitioner had questioned the honesty and integrity of her colleagues on the computer art search committee and had often alienated her colleagues in other ways such as concluding a departmental retreat by verbally attacking them; referring in a hostile manner to "an 800 or 900 pound gorilla in Art Education;" reading a lengthy poem at a faculty meeting criticizing her colleagues; and provoking a loud argument with a colleague in the hall. (Resp. Firestone, *et al.*, C.A. Br. 5.) Many of her colleagues and

students (both male and female) memorialized the reasons for their votes against and/or problems with Petitioner in subsequent letters to Dr. Firestone. (Resp. Firestone, *et al.*, C.A. Br. 5-6) (referred to by Petitioner as the "separate personnel file," Petition 14).

Despite the nonrenewal vote, Petitioner received a new contract for 1996-97, and continued her employment at the art school during the 1996-97 academic year, except for the entire spring quarter, during which she took medical leave. (Pet. App. 4a; Record 100: 75-81, 114-115). The Dean and the Associate Dean had informed Firestone and the School of Art that they could not support the non-renewal vote for procedural reasons, because they could not find sufficient evidence in the file to support the faculty's negative vote and they felt the faculty had not sufficiently discussed the matter prior to the vote. (Pet. App. 4a).

Petitioner's third-year review

At the end of a faculty member's third year at the University of Georgia, her colleagues conduct a third-year review to assess the progress she has made toward earning tenure. (Pet. App. 4a; *see also* Pet. App. 4a n. 1). Because of Petitioner's concerns about the process, she began to work closely in this regard with Dr. Hugh Ruppersburg, the new Associate Dean of the School of Art. (Record 100: 91).

Dean Ruppersburg offered written assurance to Petitioner that a file of letters gathered by Respondent Firestone the previous summer to support the 1995 nonrenewal decision would not be considered by the third-year review committee; that she would have the opportunity to respond to the third-year review committee's report

in accordance with the University's *Guidelines for Appointment, Promotion, and Tenure*; and that Firestone had been instructed to make sure the third-year committee would conduct itself accordingly. (Record 100: 90 exs. 1, 2). Petitioner found the selection of the committee members, three of the four of whom were women, to be acceptable. (Resp. Firestone, *et al.*, C.A. Br. 7; Record 100: 101).

During the third-year review process, some of the members asked Petitioner about her medications and her mental health. (Pet. App. 5a, 6a; Record 100: 93-96). Respondent Squires explained in a memorandum the role he felt that illness had played in the problems Petitioner had had in the School of Art. (Resp. Board of Regents C.A. Br. 11). Dr. Squires testified that his intent in creating the memo was to help Petitioner by explaining possible reasons for her non-collegial behavior. *Id.*

1996 ineffective nonrenewal vote for 1997-98

The third-year review committee presented its report to a meeting of the faculty, at which the senior faculty were to vote on whether to offer an employment contract to Petitioner for the 1997-98 academic year. (Pet. App. 5a; Resp. Board of Regents C.A. Br. 11-12, 13-14). The five-page committee report concluded: "The committee agreed that Dr. Stavropoulos is making good progress toward achieving promotion and tenure in the area of research. However, persistent and ongoing problems in the areas of teaching and service are jeopardizing Dr. Stavropoulos' progress towards promotion and tenure." (Pet. App. 5a-6a; Record 100 ex. 3).

The senior faculty voted not to offer Petitioner a contract for 1997-98 due to "[r]epeated instances of unfortunate or

unprofessional behavior involving both students and faculty [which] caused both to feel threatened and impugned by Dr. Stavropoulos." The third-year review committee had noted that "public expressions of anger, shouting, as well as berating and belittling colleagues has created a difficult working environment." (Pet. App. 5a-6a; Resp. Board of Regents C.A. Br. 12-14; Record 100 ex. 3). The committee had also cited Petitioner's holding numerous classes in her home rather than on campus and her assigning "all 'A' grades (30+ students) for one full calendar year (1995)," which called "into question positive student course evaluations." Also noted were Petitioner's "inability to deal constructively with criticism from students and colleagues," as well as her resistance to learning and following procedures, both of which resulted in inaccurate guidance and advice to students. *Id.*

Petitioner's grievance to Faculty Senate regarding the 1996 nonrenewal vote

The 1996 nonrenewal vote was reversed by the College of Arts and Sciences' Faculty Senate Grievance Panel pursuant to Petitioner's formal grievance, as provided for in the University policies and procedures for the College of Arts and Sciences (Record 132 ex. BB), before the 1997-98 academic year commenced. (Pet. App. 6a; Resp. Board of Regent C.A. Br. 12). An evidentiary hearing was conducted, and Petitioner hired an attorney for her representation at it. (Record 100: 107-110 ex. 4). Despite the problems identified in the third-year committee's report, Petitioner received a contract for the 1997-98 academic year prior to the beginning of school. Petitioner was employed for the 1997-98 academic year with no loss of salary. (Pet. App. 6a; Resp. Board of Regents C.A. Br. 12).

Proceedings Below

Petitioner Carol Stavropoulos filed her Complaint in the Middle District of Georgia, Athens Division, on October 20, 1997. She asserted claims against the Board of Regents and three individual colleagues in the University of Georgia School of Art under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; and 42 U.S.C. § 1983 for alleged violation of free speech, among other grounds. (Pet. App. 1a). The Court of Appeals for the Eleventh Circuit affirmed the Orders of the district court granting summary judgment on the Title VII retaliation claims against individual Respondents Firestone, Squires and Nix, in their official capacities, and Respondent Board of Regents; and granting summary judgment to the individuals on Petitioner's claims of retaliation under Title VII and under 42 U.S.C. § 1983 for violation of her First Amendment right to free speech. (Pet. App. 18a).

REASONS FOR DENYING THE WRIT

I. Current case law across the various circuits is consistent with this Court's previous decisions and provides the necessary flexibility to address claims of "adverse employment actions" under the facts of individual cases.

This Court's decision in *Rutan v. Republican Party*, 497 U.S. 62 (1990), clarified in necessarily broad terms the standard for what kinds of employer conduct are actionable in a First Amendment retaliation case brought under

42 U.S.C. § 1983.[1] *Rutan* established that adverse employment action is not limited to terminations, but "extends to promotion, transfer, recall [after layoff], and hiring decisions based on party affiliation and support. . . ." 497 U.S. at 79. The Court noted that requiring the adverse employment action to be equivalent to a dismissal was unduly restrictive because it failed to recognize that there were deprivations less harsh than dismissal that pressured state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. *Rutan*, 497 U.S. at 75; *see Elrod v. Burns*, 427 U.S. 347, 356-357 (1976). This Court's holding in *Rutan* was followed by the Eleventh Circuit below and is consistent with what Petitioner refers to as the "majority rule" of Circuits 1, 3, 4, 6, 7, 9, 10 and D.C., and the "minority rule" of Circuits 5, 8 and 11.

The current "majority rule," as characterized by the Petitioner, is articulated in *Cole v. Me. Sch. Admin. Dist. No. 1*, 350 F. Supp. 2d 143, 152 (D. Me. 2004), as the "reasonably likely to deter" test: "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity[]" (citing *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000)).[2]

The current "minority rule" was set forth by the Eleventh Circuit below in the case *sub judice* as follows:

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[1] Although the Petition refers to "actionable retaliation" in § 1983 cases, the specific issues before the Court are whether any employer conduct towards Petitioner satisfies the retaliatory adverse employment action requirements of a 42 U.S.C. § 1983 prima facie case under the First Amendment, and a Title VII prima facie case. The two claims are treated together in this Brief.

[2] *Cole*, 350 F.Supp. 2d at 152 n. 13.

> A public employer retaliates when he takes an adverse employment action that is likely to chill the exercise of constitutionally protected speech.
>
> [. . .]
>
> While it is true that a claimant must show a chilling effect on her protected speech, she must also show that this effect resulted from an adverse employment action. To be considered an adverse employment action in a First Amendment retaliation case, the complained-of action must involve an important condition of employment.

Pet. App. 12a, 13a (citations omitted).

As recognized by the Eleventh Circuit, this Court's holding in *Rutan*, however, does not mean that *any* employer conduct likely to chill an employee's exercise of constitutionally protected speech is actionable, nor does it impose an unnecessarily high standard for showing adverse action. Instead, the standard imposed by *Rutan* is fact-specific, flexible and appropriate to First Amendment employment cases, which place special focus on the relationship between governmental employer and employee and their regular interactions and communications.[3] Employment cases take form in an arena from which both parties draw important and distinct benefits, both material and intangible. To omit the "employment" aspect from

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[3] The three examples of what does and does not constitute adverse employment action in the section of the EEOC Compliance Manual cited in the Petition illustrate the significance of the relationship between employer and employee and the culture of the workplace in the "adverse employment action" analysis. *U.S. Equal Employment Opportunity Comm'n Compliance Manual*, § 8 at 14 (May 1998).

the adverse employment action requirement, reducing it to any action by a public employer that has some chilling effect on protected speech ignores the realities of the workplace, its opportunities and its pitfalls.

The flexible standard of *Rutan*, applied by all judicial Circuits, accommodates the myriad situations and circumstances that may or may not constitute adverse employment action. This flexible standard does not represent a split in the determinations of the various circuit courts of appeals, but, as recognized by the Third Circuit in *Brennan v. Norton*, 350 F.3d 399, 419 (3d Cir. 2003):

> "Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry focusing on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, *and the nature of the retaliatory acts." Suarez Corp. Industries v. McGraw,* 202 F.3d 676, 686 (4th Cir. 2000) (emphasis added). Consequently, "to properly balance these interests, courts have required that the nature of the retaliatory acts committed by a public employer be more than *de minimis* or trivial." *Id.* A public employer "adversely affects an employee's First Amendment rights when it refuses to rehire an employee because of the exercise of those rights or when it makes decisions, which relate to promotion, transfer, recall and hiring, based on the exercise of an employee's First Amendment rights." *Id.* (Citations and internal quotations omitted). "On the other hand, courts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts

> were criticism, false accusations, or verbal reprimands." *Id.* (citations omitted).

Brennan, 350 F.3d at 419. The Third Circuit's decision highlights the harmony between the various circuits by acknowledging the variety of circumstances to which the standard for adverse employment action properly applies. The scope of application of the *Rutan* standard in all circuits attests to its flexibility, which should be maintained by denying certiorari in the case *sub judice*.

Determination of what constitutes adverse employment action under First Amendment retaliation and Title VII retaliation analyses must occur on a case-by-case basis in all but the most obvious cases. A ruling from this Court that adverse employer actions are to include any or every transfer, minor disciplinary action, memorandum and other correspondence, investigation and administrative decision, even if it was never effectuated, would be a disservice to Circuit and District Courts across the country, which are regularly presented fact patterns involving innumerable complexities of the collective American workplace, and in which the exercise of judicial discretion is both necessary and appropriate. A strictly uniform approach to what constitutes adverse employment action for purposes of First Amendment and Title VII analysis is inappropriate and unnecessary. Where factors such as factually nuanced circumstances, workplace culture, personalities and intent are involved, "one-size-fits-all" does not fit. "The definition of adverse action is not static across contexts[,]" *Suarez Corp. Indus. v. McGraw,* 202 F.3d at 686 (citing *Thaddeus-X v. Blatter*, 175 F.3d 379, 398 (6th Cir. 1999)), nor should it be.

II. No action identified by Petitioner rises to the level of adverse employment action in analysis of a First Amendment retaliation claim under 42 U.S.C. § 1983 or under Title VII.

Petitioner argues that five employer actions were retaliatory adverse employment actions which can serve as the basis of her claims. As demonstrated correctly by the opinion below, none of the five accounts of alleged adverse action constitutes a retaliatory adverse action under even the most liberal interpretation of the *Rutan* standard.

The first employer action is Dr. Firestone's "letter" to colleagues Bradley Tindall and Petitioner in response to previous correspondence from them notifying the administration that they were filing a "minority report" concerning the computer art search. (Record 111 exs. 16, 17). Dr. Firestone's memorandum addresses only the procedural irregularity of hiring committee members communicating up the chain of command after their advisory role was fulfilled. (Record 111 ex. 17). It is simply a factual communication from supervisor to employee. There is no objective chilling effect on further expressions of protected speech. *See Phillips v. Bowen*, 276 F.3d 103, 109 (2d Cir. 2002).

Characterization of the memorandum by Petitioner as being retaliatory adverse employment action renders virtually any written guidance, advice or transfer of information from supervisor to employee actionable. *See Suarez Corp.*, 202 F.3d at 687. That clearly is not a standard embraced by this Court or any of the various circuits.

The second alleged retaliatory adverse employment action is what Petitioner labels the "internal investigation" conducted by Dr. Firestone to support the 1995 vote not to renew Petitioner's annual contract for the 1996-97

academic year. Because Respondents never notified Petitioner of the nonrenewal, and the nonrenewal was never put into effect, the "investigation" in itself was not related to anything even resembling an adverse action. *See Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004) (holding investigation, together with ultimate denial of paid sick leave, subject to review as adverse action.)

The third alleged retaliatory adverse employment action was Dr. Squires's "false accusations" of mental illness. The Ninth Circuit Court of Appeals has recognized false accusations to be actionable under 42 U.S.C. § 1983 only when in combination with more substantial adverse action and causally linked to protected speech. *See Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004) (holding that false accusations and other wrongful, concerted conduct intended to institute an unfounded criminal charge, were sufficient to state a claim under § 1983 for violation of his First Amendment rights); *Coszalter v. City of Salem*, 320 F.3d 968, 976-977 (9th Cir. 2003) (applying the "reasonably likely to deter [protected speech]" test to hold that a reprimand containing a false allegation, taken together with a criminal investigation, repeated and ongoing harassment and humiliation, a ten-day suspension from work, and other employer actions were adverse employment actions).

Other Courts of Appeals hold that employer speech such as false accusations are only actionable when they include "a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow." *Suarez Corp.*, 202 F.3d at 687. Otherwise, "such speech does not adversely affect a citizen's First Amendment rights, even if defamatory." *Id.*; *see* 202 F.3d at 687-688 for additional citations and quotations in

accord); *Benningfield v. City of Houston*, 157 F.3d 369, 376-377 (5th Cir. 1998) (holding that employees "falsely accused" of criminal wrongdoing and "verbally reprimanded" by their employer failed to allege adverse employment actions sufficient to constitute retaliation), *cert. denied*, 526 U.S. 1065 (1999) (cited in *Suarez Corp.*, 202 F.3d at 686); *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998) ("It would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation.")

The fourth alleged, retaliatory adverse employment action was Petitioner's performance evaluation for calendar year 1995 in which Petitioner scored 3.6 out of 5.0. (Record 121: 134 ex. 11). As Firestone was Petitioner's immediate supervisor,[4] this written review of job performance was but another instance of day-to-day personnel management in an employment setting, not an "adverse employment action." The Annual Faculty Evaluation of Petitioner was performed in accordance with the same standards used to evaluate other School of Art faculty, including "Professional Service and University Governance." Respondent Firestone was merely fulfilling his duties as Art School Director and not demonstrating any retaliatory animus necessary to transform this routine managerial function into an adverse employment action.[5]

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[4] Firestone's initial scoring of Petitioner's performance, including the written comments, was made with input from a four-member committee of three men and one woman. (Record 121: 134 ex. 11).

[5] Firestone testified, "[Petitioner's] continued [. . .] questioning of the faculty [hiring] process is alienating faculty. At that point, I never heard anything about gender discrimination. All I heard was that the best candidate by far had not been selected. . . . I asked her to be aware

(Continued on following page)

The fifth alleged retaliatory adverse employment action was the 1996 vote of the senior faculty not to renew Petitioner's employment contract for the 1997-98 academic year. This vote was reversed by a grievance committee of the Faculty Senate, pursuant to Plaintiff's formal grievance, as provided for in the University policies and procedures for the College of Arts and Sciences (Record 132 ex. BB; *see* Pet. C.A. Br. 29), before the 1997-98 academic year commenced. (Record 100: 101-02, 105-107). Petitioner's successful appeal of that decision does not transform the faculty vote, reversed and remedied by Respondents' own procedures, into an adverse employment action. *See DeGuiseppe v. Palermo*, 68 F.3d 187, 191 (7th Cir. 1995) (holding exercise of plaintiff's own volition in ending his police career rendered termination not actionable).

Petitioner argues that the attorney's fees expended to appeal the nonrenewal of her employment contract for the 1997-98 academic year renders her successful appeal an adverse employment action and "actionable retaliation." This argument transposes cause and effect, confuses a damages issue with the more fundamental one of adverse employment action, and introduces the employee's own volition into the standard of what constitutes "adverse employment action." *See Speigla v. Hull*, 371 F.3d 928, 941, n.6 (7th Cir. 2004) (rejecting the plaintiff's contention that the pay cut she received after voluntarily applying for and being assigned to a new position is evidence of adverse action, despite her feelings that she was "forced" to do it).

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that her persistence [. . .] was not responsive to a collegial process arrived at by consensus. . . ." (Record 121: 140-141).

Even when viewed in the aggregate, the five employer actions discussed in the Petition do not constitute adverse employment action. The standard for adverse employment action in the Second Circuit, as articulated in *Phillips v. Bowen,* 276 F.3d 103, 109 (2d Cir. 2002), requires an objective assessment of whether "the total circumstances of an employee's working environment changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, work place." *Id.* With objective consideration of even the cumulative impact on Petitioner of Dr. Firestone's memorandum to Tindall and Petitioner of March 27, 1995, the "internal investigation," the "false accusations," the performance evaluation for 1995, and the 1996 nonrenewal vote, in light of Petitioner's own exacerbation of the problems of her workplace environment, the employer actions fail to meet the standard applied in *Phillips.*

III. Lowering the standard for what constitutes adverse employment action would effectively eviscerate the defense of qualified immunity, as virtually all government decisions and actions could be adverse actions under "clearly established" law.

Individual Respondents such as those in the instant case, as government officials performing discretionary functions, are generally granted qualified immunity and thus "'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald,* 457 U.S. [800,] 818 [1982]." *Wilson v. Layne,* 526 U.S. 603, 615 (1999); *see Anderson v. Creighton,* 483 U.S. 635, 639 (1987) (citing

Harlow, 457 U.S. at 819); *see also Graham v. Connor*, 490 U.S. 386, 397 (1986). "The central purpose of qualified immunity is to protect public officials 'from undue interference with their duties and from potentially disabling threats of liability.' *Elder v. Holloway*, 510 U.S. 510, 514 [. . .] (1994) (quoting *Harlow*, 457 U.S. at 806)." *Snyder v. Nolen*, 380 F.3d 279, 289 (7th Cir. 2004).

A determination of entitlement to qualified immunity involves determining whether the facts alleged show that Respondents violated a constitutional right, and whether that right was clearly established at the time of the violation. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) The clearly established inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* "'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 202 (quoting *Anderson*, 483 U.S. at 640).

Should the current fact-specific, flexible standard for retaliatory adverse employment action under 42 U.S.C. § 1983 be lowered to include the employer actions discussed in the Petition, government actors would be hobbled, as exercise of virtually any aspect of their authority and fulfillment of virtually any duty assigned them would be an adverse action under "clearly established" law. "The definition of adverse action is not static across contexts." *Thaddeus-X v. Blatter*, 175 F.3d at 398. Instead, it has the capacity to accommodate, whether inclusively or exclusively, the variety of fact patterns presented by public employment. Petitioner's position eviscerates the defense of qualified immunity and has potential to expose government employers to undue interference with their performance of their duties, threats of liability, as well as the

demands of litigation. *See Snyder*, 380 F.3d at 289 (citations omitted).

CONCLUSION

The current standard for adverse employment action in the analyses of § 1983 First Amendment claims and Title VII retaliation claims, is very much workable, as demonstrated by its application by all the judicial circuits. For this and all foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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